"The United States and International Law"

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Thank you very much for coming tonight. It's a privilege to be here in The Hague, before this distinguished audience, to give a speech about the United States and international law.

Some of you may think it rather bold of me to come to a city renowned for its institutions of international peace, justice, and security and talk about the United States' commitment to international law. It is hardly news that the United States has taken a battering in Europe, particularly over the last few years, for its commitment to international law – or, rather, what is criticized as its lack of commitment.

To put it simply, our critics sometimes paint the United States as a country willing to duck or shrug off international obligations when they prove constraining or inconvenient.

That picture is wrong. The United States *does* believe that international law matters. We help develop it, rely on it, abide by it, and – contrary to some impressions – it has an important role in our nation's Constitution and domestic law.

Three days after she was sworn in to office, at a meeting to which all State Department employees were invited, Secretary Rice declared:

> This Department, along with the rest of the Administration, will be a strong voice for international legal norms, for living up to our treaty obligations, to recognizing that American's moral authority in international politics also rests on our ability to defend international laws and treaties.

Tonight I will show you how we have kept the Secretary's promise. I will demonstrate that our approach to international law – how and why we assume international obligations, how we implement those we have assumed, and how international law binds us in our domestic system – all reinforce our commitment to international law.

In the course of the evening, a few themes should emerge. One is that a reliance on sound bites and short-hand can give the deeply misleading impression that we are not committed to international law. A second is, in fact, deeply ironic: that the very seriousness with which we approach international law is sometimes mischaracterized as obstructionism or worse. A third is that some of the most vehement attacks of our behavior – although couched as legal criticism – are in fact differences on policy. A fourth and related theme is that our critics often assert the law as they wish it were, rather than as it actually exists today. This leads to claims that we violate international law – when we have simply not reached the result or interpretation that these critics prefer.

It is a happy coincidence that I am giving a speech on the United States and international law today, the day after the sixtieth anniversary of the announcement of the Marshall Plan. That extraordinary effort demonstrated that the U.S. commitment to a free, democratic and stable Europe did not end with the coming of peace. With U.S. participation and leadership, the international community created new organizations that were unprecedented in scope and function. The United Nations and the Bretton Woods

institutions were only the first. Later, we worked with the international community to build new institutions, including the World Trade Organization. We helped reshape the UN Security Council into a positive force in meeting new threats to peace and security, including Saddam Hussein's invasion of Kuwait, the breakup of the former Yugoslavia, and various conflicts in Africa. And we continue to work multilaterally, with friends and allies, to face continuing challenges. Just last week, our efforts, in tandem with others on the Security Council, resulted in the establishment of the new Special Tribunal for Lebanon to bring to justice those suspected of assassinating former Lebanese Prime Minister Rafik Hariri.

On a less visible level, the United States participates actively in a number of international organizations and argues its positions before international bodies like the International Court of Justice, the WTO, the Iran-U.S. Claims tribunal, and NAFTA tribunals. Every year we negotiate and conclude hundreds of international agreements and treaties. We entered into 429 last year alone, which belies the notion that we shrink from accepting international obligations. And just recently, this Administration put forward a priority list of over 35 treaty packages that we have urged the Senate to approve soon, including the UN Convention on the Law of the Sea.

Our level of engagement is reflected in the resources we devote to international law efforts and how we integrate such efforts into the decision-making process. For example, at the State Department (which is not the only agency with international lawyers), I have a staff of 171 lawyers, who work every day to furnish advice on legal matters, domestic and international, and to promote the development of international law as a fundamental element of our foreign policy.

This is not a picture of a country indifferent to international institutions and international law, but rather a country actively engaged in and with international law. Indeed, it is a reflection of our belief in the role international law can and should play, which includes shaping cooperation on international concerns, ensuring accountability and justice, and settling disputes peacefully.

I. U.S. treaty practice demonstrates commitment to international law

If your information comes mainly from the press – particularly its reporting on how the U.S. negotiates and joins treaties – you may have a jaundiced view of U.S. commitment to international law. In part, this is because the

press focuses a disproportionate level of critical attention on the United States (a "side-benefit" of our global role and reach), and so its reporting can be unbalanced. The press also tends to focus on a small number of treaties, some of which have been transformed into symbols for what is seen as the United States' hostility to international law and global cooperation.

In reality, our treaty practice reflects the seriousness with which we take international obligations, not our indifference to them. For example, whenever we consider taking on new obligations, we examine a number of factors – What problem is the treaty designed to address? Is it a problem susceptible to solution through a treaty? Will we be in a position to implement, or will there be complications because of domestic law?

During negotiations, we try to eliminate ambiguities and pin down important questions of policy. This makes it harder to paper over disagreements, and sometimes harder to reach consensus. But we don't do this to be obstructionist. Rather, we want the treaty obligations to be as clear as possible. This is in part a matter of good draftsmanship, and an attempt to head off disputes and promote compliance. But it is also a reflection of the

reality in which we operate: We need to explain to our Senate exactly what obligations we are taking on and what the implications of joining a particular treaty are. Important too, is what happens after we join a treaty. More than almost any other state, we are subject to broad and vigorous oversight through private litigation and scrutiny by the press, civil society, and the international community as a whole. If we do not get the words in a treaty exactly right, we will have to answer for the consequences.

This accountability, coupled with the seriousness with which we implement our obligations, also explains why we are so careful from the very start to determine whether we need to subject our ratifications of treaties to any reservations or understandings and why we make sure to line up any implementing legislation in advance. Unlike certain countries, we do not join treaties lightly, as a goodwill gesture, or as a substitute for taking meaningful steps to comply.

Ironically, this rigorous approach is sometimes seen not as a mark of seriousness, but as a sign of hostility. In part, this can be traced to a widespread view that willingness to join a treaty is a litmus test of a country's commitment to international law. Under this view, joining a treaty

is good; not joining a treaty, or expressing concerns about its purpose, enforceability, effects, or ambiguity, are the excuses of a nation unwilling to shoulder international responsibilities.

Take, for example, the International Criminal Court. Some critics have interpreted our decision not to become a party as an expression of disdain for international law and international institutions. This is wrong. In fact, for many years, the United States sought to create a permanent tribunal to deal with international crimes. Back in 1990 our Congress called for the creation of such a body – but made clear that its support would hinge on the tribunal's guarantees of due process and fair trial, and its respect for national sovereignty.

In our view, the Rome Statute falls short. We object on principle to the ICC's claim of jurisdiction over persons from non-party states. And we are particularly concerned by the ICC's power to self-judge its jurisdiction, without any institutional check. We hope that the prosecutor and members of the court will honor their jurisdictional limits, and that the ICC will act only when a state with jurisdiction over an international crime is unable or unwilling to do its duty. But we cannot ignore the chance that a prosecutor might someday assert jurisdiction inappropriately, and the Rome Statute

offers no recourse in such a situation. Our attempts to address such concerns during the drafting of the Statute failed – leaving us unable to join.

This decision was in no way, however, a vote for impunity. We share with the parties to the Statute a commitment to ensuring accountability for genocide, war crimes, and crimes against humanity – look, for example, to our unflagging support for the tribunals established to prosecute crimes committed in such disparate places as the former Yugoslavia, Rwanda, and Sierra Leone. We also believe that our domestic system is capable of prosecuting and punishing our own citizens for these crimes.

Moreover, over the past couple of years we have worked hard to demonstrate that we share the main goals and values of the Court. We did not oppose the Security Council's referral of the Darfur situation to the ICC, and have expressed our willingness to consider assisting the ICC Prosecutor's Darfur work should we receive an appropriate request. We supported the use of ICC facilities for the trial of Charles Taylor, which began this week here in The Hague. These steps reflect our desire to find practical ways to work with ICC supporters to advance our shared goals of promoting international criminal justice. We believe it important that ICC

supporters take a similarly practical approach in working with us on these issues, one that reflects respect for our decision not to become a party to the Rome Statute. It is in our common interest to find a *modus vivendi* on the ICC based on mutual respect for the positions of both sides.

More recently, we took a drubbing over our objections to the UNESCO Cultural Diversity Convention, accused of being against culture, against diversity, and against treaties. This is silly, and not only because the United States is among the most multicultural nations on earth. In our view, the Convention reflects in part the efforts of some countries to engage in protectionist behavior under the guise of diversity; its ambiguous language can be read to permit the imposition of restrictive trade measures on goods and services defined as "cultural," including books, newspapers, magazines, movies – and perhaps even content available over the internet. This could undermine other international mechanisms, such as the General Agreement on Trade in Services and other WTO agreements, and could, by hindering the free flow of information, raise human rights concerns. One may disagree with the policy judgment not to join. But it hardly shows disrespect for international law to oppose one international legal regime because it

threatens to undermine another.

It is also simplistic and misleading to set up ratification of a treaty as a test for whether a state takes the underlying issue seriously. Take the Kyoto Protocol. Is it truly a proxy for whether a state takes climate change seriously? First, a developed country can join Kyoto without necessarily taking on stringent commitments. Indeed, some countries – rather than having to take climate-change measures themselves – will actually be net financial beneficiaries. Second, even when a country has commitments under the Protocol, it will not necessarily implement them. A U.S. push for serious consequences for non-compliance was successfully opposed by other developed countries. As a result, the Protocol lacks bite. Third, developing countries do not have any commitments under Kyoto to limit their emissions, despite the fact that they are generating the highest increase in emissions. These flaws, coupled with anticipated harm to the U.S. economy, were legitimate reasons not to join Kyoto. Our concern for climate change, however, has led us to pursue a host of climate-related measures, both domestically and internationally. Just last week, President Bush expressed support for major country emitters of greenhouse gases and energy

consumers to convene and develop, by the end of 2008, a new post-2012 framework on climate change.

Similarly, in the case of the Convention for the Elimination of Discrimination Against Women (CEDAW), we have not been persuaded that the binding international obligations contained in that treaty would add anything to the measures we take domestically. Our law is already highly protective of women's rights. In addition to a constitutional guarantee of equal protection, we have robust federal anti-discrimination laws and the recently reauthorized Violence Against Women Act. Further, the United States is a world leader in promoting women's rights and participation in the political process. We have spent billions of dollars in foreign aid to improve women's political participation, economic status, education, health care, and legal rights. Indeed, our levels of direct assistance for women around the world have increased substantially over the past four years. It cannot seriously be maintained that our decision not to push for ratification of this treaty reflects a lack of respect for, or attention to, women's rights.

Finally, I want to take issue with the notion I sometimes hear that we don't join treaties so that we can avoid compliance. For example, the United States has been abiding by the Law of the Sea Convention since 1983, even though we have not yet joined. The Convention is enormously important: It codifies and clarifies rights and obligations concerning a wide variety of navigational, economic and environmental issues relevant to the use of the world's oceans. Early on, concerns about the deep seabed mining aspects of the Convention kept the United States and others out. An implementing agreement resolved those concerns, and this Administration is a strong supporter of U.S. participation. We have been working with the Senate to move the treaty forward. In fact, although the press has not actively reported it, last month President Bush personally urged the Senate to approve the Convention during this session of Congress. Our strong hope is that we will be able to join the Convention shortly. But in the meantime our conduct has been fully consistent with its obligations.

Some may see our concerns about the potential difficulties in these treaties as excessively scrupulous. Certainly if the U.S. were to take the approach of "join now and worry about complying later," there might be more international law. But would the international law be better? If treaties do

not create clear and serious obligations, but only express good intentions, they lose their capacity to encourage states to rely on each other. I believe that our approach results in stronger and more effective international cooperation in the face of real global problems.

II. U.S. practice demonstrates belief in the important role of international law

Let me turn from the international obligations we undertake to how we meet them. I have heard people say that the United States, and this Administration in particular, does not regard international law as "real law" – in effect, that we cast international obligations aside when they would interfere with our immediate interests.

To the contrary, we recognize that international law has a critical role in world affairs, and is vital to the resolution of conflicts and the coordination of cooperation.

Secretary Rice could not be clearer on this point. Shortly after taking office, she told the American Society of International Law:

> When we observe our treaty and other international commitments, . . . other countries are more willing … to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

This commitment to international law is reflected in the seriousness with which we approach our international obligations – even when implementing them proves difficult or painful. Let me give you a few examples.

For nearly a decade the United States has struggled to reconcile our obligation to obey orders of the International Court of Justice with our system of criminal justice, in which most criminal law is state, not federal, law. In 1998 the ICJ asked the Clinton Administration to delay the execution of a convicted murderer who claimed certain rights under the Vienna Convention on Consular Relations. The U.S. government conveyed

the request to Virginia, the state that had imposed the sentence, along with its endorsement of the request, but believed it could do nothing more.

More recently, in the Avena decision, the ICJ ordered the United States to review the cases of 51 Mexican nationals convicted of capital crimes. All of these individuals were represented by counsel and had or will have multiple opportunities to seek judicial review of their convictions and sentences. All of their lawyers had reason to know of the Vienna Convention and how it affected their clients. But all had failed to present the grievance about violation of the Vienna Convention to the trial court in a timely manner. The ICJ, however, declined to acknowledge the U.S. rule requiring timely presentation of a defense during the course of a criminal trial – a rule that prevents defendants and their lawyers from abusing the system to obstruct and delay the administration of justice.

The cases covered by the ICJ judgment all involved heinous murders, including of young children. Some proceedings had gone on for many years, with the victims' families patiently waiting while our state and then federal courts reviewed the outcome to ensure that it fully complied with our laws. Yet the ICJ judgment nonetheless required us to review these cases again to

consider the unlikely possibility that the outcome would have been different if the defendant had been asked whether he wanted his consular officer notified of his arrest.

It is hard for those who were not intimately involved in the process to appreciate how difficult, legally and politically, this issue was, or how seriously we took it. The pressure on this administration was enormous: The President had been Governor of Texas, where many of the cases arose. The crimes had been atrocious, and the ICJ judgment required us to disregard the normal rules of procedure for our criminal trials. The President, acting on the advice of the Secretary of State, nonetheless decided to require each State involved to give the 51 convicts a new hearing.

The first defendant to try to take advantage of the President's decision was in the state of Texas, which objected to the President's decision. In response, the Texas Court of Criminal Appeals ruled that the President had no power to intervene in its affairs, even to obtain compliance with an order of the ICJ. This Administration has gone to the Supreme Court of the United States to reverse this decision. We expect a ruling from that Court this time next year.

This is not the only time we have defended an international principle against a local interest. New York City has sued India and Mongolia in our courts for taxes said to be owed on property owned by their UN missions. We believe the law of sovereign immunity bars these suits, and we sided with the foreign governments against New York, both in the lower court and, most recently, in our Supreme Court. We expect a decision shortly.

Let us look next at how the United States meets its obligations in the field of international economic law. In the negotiations leading to the Uruguay Round Agreements, the United States pushed for creation of a strong and independent dispute settlement body within the World Trade Organization. In the years that followed, some of our trading partners have initiated dispute settlement proceedings, asking the WTO to declare that certain of our domestic laws do not comply with the Agreements. On occasion we have lost. In some instances, the required response has been wrenching. To comply with one WTO ruling regarding alleged subsidies, for example, this Administration persuaded Congress to end an important decades-old tax program that the old, pre-1994 GATT regime had specifically approved. We did not like this result, but we complied.

Finally, I would like to touch on what is probably the most divisive and difficult international legal issue that we have faced: our detention policies. Frankly, I don't expect that most of you will agree with the steps we took or the decisions we made, but I hope you will understand the difficulty we faced after September 11, when we captured or took into custody suspected members of Al Qaida and the Taliban.

We were confronted by a dilemma: What legal rules to apply to them? These suspected terrorists did not fit neatly within existing legal rules – whether of domestic criminal law or the laws of war. The majority were captured or turned over to U.S. forces in Afghanistan or Pakistan during the international armed conflict that took place in Afghanistan in 2001 and 2002. Most of these persons could not be tried in U.S. courts because U.S. criminal laws did not extend to their activities in Afghanistan, with the obvious exception of those who committed specific war crimes This, of course, is a very different situation from that of terrorist suspects in Europe in the 1980s and even today, where European courts can preside over domestic prosecutions of members of the IRA, the Red Brigades, the Red Army Faction and, now, of Islamic extremists in London and Madrid.

On the other hand, these detainees did not qualify, as some critics claim, as prisoners of war under the Geneva Conventions – which by their terms apply only to conflicts between High Contracting Parties and also extends special protection only to persons who openly identify themselves as part of a party's armed forces.

This Administration has worked hard to identify and implement international rules applicable to these terrorist suspects. We have not ignored, changed, or re-interpreted existing international law. In fact, last year, our Supreme Court ruled that the one provision of the Geneva Conventions that does apply, even if the Conventions as a whole do not, is Common Article 3. Because this creates at best an incomplete legal framework, it has been necessary for the Administration to work with Congress to fill in the gaps in our detention system – something we have done in a way that complies with and in certain respects exceeds our obligations under Common Article 3.

As a result of many discussions with European governments, a growing number of European officials and legal experts have come to acknowledge that members of Al Qaida captured outside our own territories do not fit

neatly into traditional criminal law rules or into the Geneva Conventions. Although we do not – and will not – always see eye to eye, I am encouraged that we have reached some degree of common ground, and that there is a growing acknowledgment of a gap in the international legal system.

In each of these examples, the United States, and this Administration in particular, has worked hard to uphold international law. The efforts we have made are not always easy to see or to appreciate. But our having taken such steps even when it was not easy or costless, and our struggles to identify an appropriate path even when one was not clear, demonstrates the respect in which the United States holds international law.

III. International law plays an important role in U.S. domestic law

As my last major topic, I would like to describe in some detail how the U.S. legal system operates to enforce international law. Rather than leaving it to politicians to decide when to comply with our international obligations, our system goes to great lengths to attach serious legal consequences to international rules. My goal here is to clear up some common myths and

misperceptions – including that international law is not truly binding in our system.

First, we should start with our Constitution. It declares that treaties are the "supreme law of the land" and assigns to the President the responsibility to take care that the laws are faithfully executed. This duty includes the upholding of such treaties. In addition, in many instances, our courts are authorized to apply and interpret international law. Indeed, our Supreme Court is increasingly confronted with cases involving international law.

In the United States we do, however, recognize a distinction between treaties that can operate immediately and directly in our legal system, without the need for an implementing parliamentary act, and treaties that require the Executive branch and Congress to take further steps to adopt a law. This distinction is not unknown on the continent either. When the European Communities joined the Uruguay Round Agreements, for example, there was an express provision that those obligations would not enter directly into force as European law. Our approach to these agreements is the exactly the same.

Let me give an example of how international obligations can be handled in our system. In the case of the Convention Against Torture, our Constitution already prohibited cruel and unusual punishment, which we interpret as encompassing torture. The United States directly enforces our obligations under Article 15 of the CAT by prohibiting the use of statements obtained through torture in legal proceedings, including military commission proceedings. Congress also adopted a statute imposing criminal sanctions on persons who commit torture, consistent with our obligations under the Convention. I should add that contrary to what you might hear from some critics, no one in the United States government has sought to disregard or avoid these obligations.

To take another example, the United States directly enforces the obligations of the Geneva Conventions, including by disciplining military personnel who violate those obligations. Moreover, Congress has enacted laws imposing criminal sanctions on U.S. nationals who commit a grave breach of these Conventions. Our military lawyers receive special training on the Geneva Conventions and work hard to uphold them wherever our forces are engaged in combat. Again, no one in our government has the authority to override these laws.

Some critics have argued that even if we regard international law as binding, we don't give it the same stature as our domestic laws. They complain that we don't do enough to open our courts to private claims based on international law. I should note that we also get criticized for exactly the opposite reason: other countries argue that our generous approach to private litigation violates international law, even when the lawsuit itself rests on claims about international law.

Most people would agree that private litigation of international law disputes is a mixed blessing, especially in a legal system like ours. Some issues touch at the heart of foreign policy and are too important to be left to the vagaries of private suits. It therefore is not surprising that no country, to my knowledge, allows unlimited private litigation of international law.

Yet the United States does provide for substantial private enforcement of international law. Let me provide some examples. Our Congress has enacted legislation that allows private persons to sue for specific violations of international law, namely extrajudicial killings and torture. Most other countries limit redress of these international wrongs only to their criminal

justice systems. Congress also opened our courts in some circumstances to claims for compensation based on expropriations of property that violate international law. And our courts will allow private parties to raise treaty issues in litigation, if the treaty clearly was intended to achieve this result.

Finally, let me respond briefly to a charge I have sometimes heard – that we hide behind our Constitution to avoid enforcing international law. This is a bit perplexing. After all, the principles of liberty and equality enshrined in our Constitution have helped inspire much of the international law of human rights that has emerged over the last sixty years. Our Constitution has contributed to the progressive development of international law, not held it back.

Still, our Constitution does require us to do certain things by congressionally enacted statutes, rather than by treaties. In particular, it requires a legislative act to impose a tax or create a crime. This reflects the critical role of the House of Representatives, which is more directly accountable to the electorate than the Senate or the President.

In addition, our Supreme Court has made clear that our Constitution protects certain core individual rights, including the right to a fair trial, to free speech, and to equal protection of the laws, from infringement by any legal act, including international rules. This practice also does not distinguish us from other countries. The German Constitutional Court, for example, in the several "Solange" decisions has upheld exactly the same principle. In those cases, decided over decades, the German Court repeatedly ruled that it, and not the European Court of Justice, has the final authority to determine whether the European treaties comply with the fundamental provisions of the German Constitution. Similarly, our highest court must have the final say when safeguarding the fundamental rights enshrined in our Constitution.

And, as I noted above, far from shielding the United States from international law, our Constitution expressly recognizes treaties as the law of the land. It also authorizes Congress to define and punish offenses against the law of nations. Our Constitution does not prescribe isolationism. To the contrary, it promotes our active participation in the development and enforcement of international law.

In sum, the United States does treat international law as real law, is serious about its international obligations, and, through its legal system, assigns courts to play an important role in international law enforcement.

Conclusion

Today's world presents many challenges, from transnational terrorism to economic interdependence to global warming, AIDS, and possible future pandemics to the eternal quest for human dignity and liberty. The United States believes that collective action and international law are essential in coordinating the international community's approach to these deep and difficult problems. Shortly after she was confirmed, Secretary Rice explained: "International law is critical to the proper function of international diplomacy." I hope I have also made it clear that the U.S. role in the world makes international law more important to us, not less. We do not seek to impose constraints on others but shrink from them ourselves. Our careful approach to treaty negotiation and treaty acceptance reflects our respect for international law, not a desire to be free of it. When we assume international obligations, we take them seriously and seek to meet them, even when doing so is painful. And where international law applies, all

branches of the U.S. government, including the judiciary, will enforce it.

The United States and its critics have gone through a difficult period of reproach and recrimination regarding international law. But in the face of the grave challenges before us, we must look forward, and seek new ways to build international cooperation and the rule of law. We are open to discussion and suggestions, and welcome the opportunity to work with all states, our traditional partners in particular. Together we must strengthen the international community and promote the rule of international law, for the sake of our collective interest and common values. The principles that The Hague symbolizes are ours too, and our common future rests on them.